

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT KESSLER,
Plaintiff,
-vs-
BY'S BURGERS and OKH, INC.
Individually ,
Defendants.
Cause No.
COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

COMES NOW, Plaintiff, ROBERT KESSLER (hereinafter the “Plaintiff”), through undersigned counsel, hereby files this Complaint and sues OKH Inc., a Washington Corporation, and By’s Burgers, also known as By’s Restaurant, (hereinafter, collectively the “Defendants”), for injunctive relief, attorney’s fees and costs (including, but not limited to, court costs and expert fees), pursuant to 42 U.S.C. §12181, et. seq., commonly referred to as the “AMERICANS WITH DISABILITIES ACT” or “ADA” and alleges:

JURISDICTION AND PARTIES

1. This is an action for declaratory and injunctive relief pursuant to Title III of the Americans with Disabilities Act, 42 U.S.C. §12181, et. seq., (hereinafter referred to as the “ADA”). This Court is vested with jurisdiction under 28 U.S.C. §1331 and §1343.

2. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391 in that all events and procedures giving rise to this Complaint occurred in this judicial district.

3. At the time of Plaintiff's personal visit to Defendants' public accommodation, prior to instituting the instant action, Robert Kessler (hereinafter referred to as "Kessler"), was a resident of the State of Washington, and suffered from what constitutes a "qualified disability" under the Americans with Disabilities Act of 1990, and used a wheelchair for mobility due to this disability. Plaintiff has an amputated leg. He is required to traverse with a wheelchair and is substantially limited to performing one or more major life activities including, but not limited to walking, standing and maneuvering.

4. The Plaintiff personally visited, on or about October 26, 2020 Defendants' premises open to the public, but was denied full and equal access to, and full and equal enjoyment of the facilities, services, goods, privileges and accommodations offered to others without disabilities; because of his disability requirements. Plaintiff lives in King County, Washington and travels in the surrounding areas near Defendants' facilities on a regular basis for shopping, dining and entertainment.

5. Upon information and belief, OKH Inc., a Washington Corporation, is the lessor and/or owner operator of the real property and/or premises that are the subject of this lawsuit, commonly referred to as By's Burgers, in Seattle, Washington.

1 6. Upon information and belief, OKH Inc., a Washington Corporation is the lessor,
2 operator and/or owner of the real property (the “Subject Facility”), and the owner of the
3 improvements where the Subject Facilities are located which are the subjects of this action and
4 By’s Burgers is the tenant or lessee of the public accommodation.
5
6

7 **COUNT I – VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT**

8 7. On or about July 26, 1990, Congress enacted the Americans with Disabilities Act
9 (“ADA”), 42 U.S.C. §12101, *et. seq.* Commercial enterprises were provided one and a half years
10 from enactment of the statute to implement all its requirements. The effective date of the Title III
11 of the ADA was January 26, 1992. 42 U.S.C. §12181; 20 C.F.R. §36.508(a).
12

13 8. Pursuant to 42 U.S.C. §12181(7) and 28 C.F.R. §36.104, the Subject Facility and
14 real property in this case is a place of public accommodation under the ADA in that they are
15 establishments which provide goods and services to the public.

16 9. Pursuant to 42 U.S.C. §12181(7) and 28 C.F.R. §36.104, the building and/or
17 premises which is the subject of this action is a public accommodation covered by the ADA and
18 which must be in compliance therewith as of the date of the Plaintiff’s visit.
19

20 10. The Plaintiff is informed and believes, and therefore alleges, that the Subject
21 Facility has begun operations and/or undergone remodeling, repairs and/or alterations since
22 January 26, 1990 and more specifically on or after March 15, 2012 as it pertains to 28 C.F.R. §
23 36.406.

24 11. Defendants have discriminated under the ADA, and continue to discriminate,
25 against the Plaintiff, and others who are similarly situated, by denying full and equal access to, and
26 full and equal enjoyment of, goods, services, facilities, privileges, advantages and/or
27

1 accommodations at Defendants' Subject Facilities in derogation of 42 U.S.C. §12101, *et. seq.*, and
2 as prohibited by 42 U.S.C. §12182 *et. seq.*, and by failing to remove architectural barriers
3 pertaining to the Plaintiff's disability pursuant to 42 U.S.C. §12182(b)(2)(a)(iv), where such
4 removal is readily achievable.

5
6 12. The Plaintiff has been unable to, and continues to be unable to, enjoy full and equal
7 safe access to, and the benefits of, all accommodations and services offered at Defendants' Subject
8 Facilities. Prior to the filing of this lawsuit, the Plaintiff visited the subject properties and was
9 denied full and safe access to all the benefits, accommodations and services of the Defendants.
10 Prior to the filing of this lawsuit, Kessler, personally visited By's Burgers Restaurant at 2901 4th
11 Avenue South, Seattle, Washington, with the intention of accessing Defendants' facilities, but was
12 denied full and safe access to the facilities due to the inactions of removing applicable barriers.
13 Plaintiff intends to return to the Defendant's premises and public accommodate upon the premises
14 being made ADA compliant for access, but is currently deterred from returning due to these
15 barriers. As such, Plaintiff is likely to be subjected to reencountering continuing discrimination at
16 the premises unless it is made readily accessible to and usable by individuals with disabilities to
17 the extent required under the ADA, including the removal of the architectural barrier which remain
18 at the premises.
19
20

21 13. Pursuant to the mandates of 42 U.S.C. §12134(a), on July 26, 1991, the Department
22 of Justice, Office of the Attorney General, promulgated Federal Regulations to implement the
23 requirements of the ADA, known as the Americans with Disabilities Act Accessibility Guidelines
24 (hereinafter "ADAAG"), 28 C.F.R. Part 36. Defendants facilities do not comply with these
25 Guidelines.
26
27

14. The Defendants' premises are in violation of 42 U.S.C. §12182 *et. seq.*, the ADA and 28 C.F.R. §36.302 *et. seq.*, and has and is discriminating against the Plaintiff. The Plaintiff was deterred from encountering every non-compliant barrier at the premises due to the nature of encountering some barriers that denied the Plaintiff's full and equal enjoyment of the facility. Therefore, the Plaintiff encountered the following specific barriers to access that include but are not limited to the following, but also retains standing to allege non-compliance for any barrier not encountered by the Plaintiff at the premises related to the Plaintiff's specific disability requirements under *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1047 (9th Cir. 2008):

VIOLATIONS

15(a). Failure to provide ADA compliant number of van accessible parking stalls at the subject property in violation of 2010 ADAS Section 208.2 and 208.4 and/or 1991 ADA Standards for Accessible Design. The premises failed to have any van accessible parking stalls to allow Plaintiff van accessible parking which Plaintiff requires as Plaintiff utilizes a wheelchair due to the Plaintiff's disability and such handicapped accessible parking stalls are necessary. Said barrier is covered by the A.D.A. guidelines and is in nonconformity with the requirements for such architecture.

15(b). Failure to provide ADA compliant disability accessible parking stall width at the subject property in violation of 2010 ADAS Section 502.2 and/or 1991 ADA Standards for Accessible Design. The premises failed to have compliant parking space stripes at a compliant width to allow Plaintiff accessible parking which Plaintiff requires as Plaintiff utilizes a wheelchair due to the Plaintiff's disability and such handicapped accessible parking stall widths are necessary. Said barrier is covered by the A.D.A. guidelines and is in nonconformity with the requirements for such architecture.

1 15(c). Failure to provide ADA compliant van accessible parking striping for access aisle
2 marking at the subject property in violation of 2010 ADAS Section 502.3.3 and/or 1991 ADA
3 Standards for Accessible Design. The premises failed to have compliant access aisle marked
4 stripes to allow Plaintiff an access aisle which Plaintiff requires as Plaintiff utilizes a wheelchair
5 due to the Plaintiff's disability and such handicapped accessible parking access aisle stripes are
6 necessary. Said barrier is covered by the A.D.A. guidelines and is in nonconformity with the
7 requirements for such architecture.

9 15(d). Failure to provide ADA compliant van accessible parking space signage at the
10 subject property in violation of 2010 ADAS Section 502.6 and/or 1991 ADA Standards for
11 Accessible Design. The premises failed to have compliant International Symbol of Accessibility
12 parking space signs to identify van accessible parking spaces to allow Plaintiff accessible parking
13 which Plaintiff requires as Plaintiff utilizes a wheelchair due to the Plaintiff's disability and such
14 handicapped accessible parking signs are necessary. Said barrier is covered by the A.D.A.
15 guidelines and is in nonconformity with the requirements for such architecture.

17 15(e). Failure to provide ADA compliant walkway with non-compliant vertical edge at
18 the subject property in violation of 2010 ADAS Section 303.3 and 303.2 and/or 1991 ADA
19 Standards for Accessible Design. The premises has a non-compliant abrupt vertical edge with
20 variations over $\frac{1}{4}$ inch in vertical rise upon the walkway and as Plaintiff utilizes a wheelchair due
21 to the Plaintiff's disability, such is a barrier. Said barrier is covered by the A.D.A. guidelines and
22 is in nonconformity with the requirements for such architecture.

24 15(f). Failure to provide ADA compliant transaction counters height at the subject
25 property in violation of 2010 ADAS Section 904.4.1 and 904.4.2 and/or 1991 ADA Standards for
26 Accessible Design. The premises failed to have a compliant transaction counters with compliant
27

1 height restrictions for wheelchair access as Plaintiff utilizes a wheelchair for mobility. Said barrier
2 is covered by the A.D.A. guidelines and is in nonconformity with the requirements for such
3 architecture.

4 15(g). Failure to provide ADA compliant point of sale height at the subject property in
5 violation of 2010 ADAS Section 308.1 and/or 1991 ADA Standards for Accessible Design. The
6 premises failed to have a compliant point of sale display with compliant height and reach
7 restrictions for wheelchair access as Plaintiff utilizes a wheelchair for mobility. Said barrier is
8 covered by the A.D.A. guidelines and is in nonconformity with the requirements for such
9 architecture.

10 15(h). Failure to provide ADA compliant number of interior booth/table seating at the
11 subject property in violation of 2010 ADAS Section 226.1 and/or 1991 ADA Standards for
12 Accessible Design. The premises failed to have compliant number of interior booth/table seating
13 with wheelchair accessible dining as Plaintiff utilizes a wheelchair for mobility. Said barrier is
14 covered by the A.D.A. guidelines and is in nonconformity with the requirements for such
15 architecture.

16 15(i). Failure to provide ADA compliant knee and/or toe clearance for wheelchair
17 mobility at the subject property in violation of 2010 ADAS Section 306.1 and/or 1991 ADA
18 Standards for Accessible Design. The premises failed to have compliant clear floor or ground space
19 knee space and toe clearance for wheelchair access as Plaintiff utilizes a wheelchair for mobility.
20 Said barrier is covered by the A.D.A. guidelines and is in nonconformity with the requirements for
21 such architecture.

22 15(j). Failure to provide ADA compliant restroom identification signs at the subject
23 property in violation of 2010 ADAS Section 216.2 and/or 1991 ADA Standards for Accessible
24

1 Design. The premises failed to have compliant restroom identification signs at the subject property
2 as Plaintiff utilizes a wheelchair for mobility. Said barrier is covered by the A.D.A. guidelines
3 and is in nonconformity with the requirements for such architecture.
4

5 15(k). Failure to provide ADA compliant restroom door width at the subject property in
6 violation of 2010 ADAS Section 404.2.3 and/or 1991 ADA Standards for Accessible Design. The
7 premises failed to have compliant restroom door width at the subject property as Plaintiff utilizes
8 a wheelchair for mobility. Said barrier is covered by the A.D.A. guidelines and is in nonconformity
9 with the requirements for such architecture.
10

11 15(l). Failure to provide ADA compliant restroom door width clearance at the subject
12 property in violation of 2010 ADAS Section 404.2.3 and/or 1991 ADA Standards for Accessible
13 Design. The premises failed to have compliant restroom door width clearance for wheelchair
14 access as Plaintiff utilizes a wheelchair for mobility. Said barrier is covered by the A.D.A.
15 guidelines and is in nonconformity with the requirements for such architecture.
16

17 15(m). Failure to provide ADA compliant lavatory clear floor space at the subject property
18 in violation of 2010 ADAS Section 604.3.2 and/or 1991 ADA Standards for Accessible Design.
19 The premises failed to have compliant lavatory clear floor space requirements for wheelchair
20 access as Plaintiff utilizes a wheelchair for mobility. Said barrier is covered by the A.D.A.
21 guidelines and is in nonconformity with the requirements for such architecture.
22

23 15(n). Failure to provide ADA compliant lavatory water supply and drain pipe insulation
24 and protection at the subject property in violation of 2010 ADAS Section 606.5 and/or 1991 ADA
25 Standards for Accessible Design. The premises failed to have compliant lavatory water supply and
26 drain pipe insulation and protection for wheelchair access as Plaintiff utilizes a wheelchair for
27

1 mobility. Said barrier is covered by the A.D.A. guidelines and is in nonconformity with the
2 requirements for such architecture.

3 15(o). Failure to provide ADA compliant ambulatory accessible compartment within the
4 lavatory at the subject property in violation of 2010 ADAS Section 604.8.2.2 and/or 1991 ADA
5 Standards for Accessible Design. The premises failed to have compliant ambulatory accessible
6 compartment within the lavatory for wheelchair access as Plaintiff utilizes a wheelchair for
7 mobility. Said barrier is covered by the A.D.A. guidelines and is in nonconformity with the
8 requirements for such architecture.

9 16. The above-referenced barriers will likely cause a repeated real injury in fact in a
10 similar way if not remedied when the Plaintiff frequents this property again as described
11 previously. Each of these barriers interfered with the Plaintiff's full and equal enjoyment of the
12 facility and deterred Plaintiff from encountering all applicable barriers at the premises by failing
13 to allow Plaintiff the same access due to the Plaintiff's disability as those enjoy without disabilities.

14 17. Upon information and belief, there are other current non-compliant barrier access
15 violations of the ADA at Defendants' premises, which may only be discovered and properly
16 identified once a full inspection of the premises is completed and identified due to Plaintiff being
17 deterred from discovering each and every barrier as a result of encountering the above-listed
18 violations.

19 18. As of the date of the filing of this suit, the readily achievable barriers and other
20 violations of the ADA still exist and have not been remedied or altered in such a way as to
21 effectuate compliance with the provisions of the ADA. The barriers to access at the premises, as
22 described above, have severely diminished Plaintiff's ability to avail Plaintiff of the goods and
23 services offered at the Subject Facilities, and compromise Plaintiff's safety.

19. Pursuant to the ADA, 42 U.S.C. §12101 *et. seq.*, and 28 C.F.R. §36.304, the Defendants were required to make the Subject Facility, a place of public accommodation, accessible to persons with disabilities since January 28, 1992. To date, the Defendants have failed to comply with this mandate.

20. The Plaintiff has been obligated to retain the undersigned counsel for the filing and prosecution of this action. The Plaintiff is entitled to have his reasonable attorney's fees, costs and expenses paid by the Defendants, pursuant to 42 U.S.C. §12205.

21. Pursuant to 42 U.S.C. §12188, this Court is vested with the authority to grant the Plaintiff's injunctive relief; including an order to alter the subject facilities to make them readily accessible to, and useable by, individuals with disabilities to the extent required by the ADA and closing the subject facility until the requisite modifications are completed.

COUNT II: WASHINGTON LAW AGAINST DISCRIMINATION

22. Plaintiff incorporates by reference all allegations in the paragraphs above.

23. Plaintiff is a qualified individual with a disability within the meaning of the Washington Law Against Discrimination.

24. Section 49.60.030(1) of the Revised Code of Washington provides in pertinent part: "The right to be free from discrimination because of . . . the presence of any sensory, mental, or physical disability . . . is recognized as a declared to be a civil right. This right shall include, but not be limited to . . . (b) the right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement . . ."

• •

25. Defendants have violated and continue to violate §§ 49.60.010 *et seq.*, of the Revised Code of Washington by violating multiple accessibility requirements under the ADA.

26. Defendants' actions constitute discrimination against persons with disabilities and violate the Washington Law Against Discrimination, Revised Code of Washington §§ 49.60.010 *et seq.*, in that persons with mobility disabilities have been and are denied full and equal enjoyment of the accommodations, advantages, facilities, privileges, and services that Defendant provides to individuals who do not have disabilities.

27. As a direct and proximate result of Defendants' discriminatory conduct as alleged in this Complaint for Declaratory and Injunctive Relief, the Plaintiff has suffered and continues to suffer difficulty, hardship, isolation, and segregation and is denied the full and equal enjoyment of services that the Washington Law Against Discrimination requires due to Defendant's failure to remediate barriers.

28. Defendants' property does not comply with the ADA's accessibility laws and regulations.

29. Because Defendants' property does not comply with the ADA's accessibility laws and regulations, declaratory and injunctive relief are appropriate remedies under the Washington Law Against Discrimination. *See e.g. Kucera v. Dep't of Transp.*, 140 Wash. 2d 200, 209 (2000).

30. Pursuant to RCW § 49.60.030(2), Plaintiff is entitled to declaratory and injunctive relief and to recover from Defendants, reasonable attorneys' fees and costs incurred in bringing this action.

PRAYER FOR RELIEF

1 WHEREFORE, the Plaintiff hereby demands judgment against the Defendants and the
2 Court declare that

- 3 A. The subject premises and facilities violate Title III of the Americans with
4 Disabilities Act and the Washington Law Against Discrimination;
- 5 B. The Court enter an Order requiring the Defendants to alter their facilities and
6 amenities to make them accessible to and usable by individuals with disabilities to
7 the full extent required by Title III of the ADA;
- 8 C. Any portions of the Defendant's premises identified as being non-compliant under
9 the ADA guidelines be enjoined from being open to the public until such time that
10 Defendants establish those areas are in full compliance with ADA requirements.
- 11 D. The Court enter an Order directing the Defendants to evaluate and neutralize their
12 policies, practices and procedures toward persons with disabilities, for such
13 reasonable time so as to allow the Defendants to undertake and complete corrective
14 procedures to the Subject Facility;
- 15 E. The Court award reasonable attorney's fees, all costs (including, but not limited to
16 court costs and expert fees) and other expenses of suit, to the Plaintiff; and
- 17 F. The Court award such other and further relief as it deems necessary, just and proper.

18 DATED this 19 day of November, 2020.

19 Respectfully submitted,

20 */s/ M. William Judnich*
21 M. William Judnich
22 WSBA #56087
23 Enabled Law Group
24 P.O. Box 4523
25 Missoula, Montana 59806
26 Telephone: 406-493-1084
27 Email: MJ@Enabledlawgroup.com